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Volume 2 | Issue 1

Article 8

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1956

## Recent Decisions

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### Recommended Citation

Various Editors, *Recent Decisions*, 2 Vill. L. Rev. 120 (1956).

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## RECENT DECISIONS

### ANTI-TRUST LAW—SHERMAN ANTI-TRUST ACT— EXEMPTION OF PROFESSIONAL FOOTBALL.

*Radovich v. National Football League* (9th Cir. 1956).

Plaintiff, a professional football player with the Detroit Lions of the National Football League, violated his contract by signing with a football organization outside the league. Later, when he sought re-employment with the Detroit Lions and other football organizations of the National Football League he was refused because of the violation of the "reserve clause"<sup>1</sup> in his contract. He brought action in a federal court for treble damages under the anti-trust acts,<sup>2</sup> claiming a conspiracy on the part of the National Football League to eliminate other leagues. The lower court dismissed the complaint. The court of appeals in affirming the decision *held* that the business of providing football exhibitions between rival football organizations is not within the scope of the anti-trust laws. *Radovich v. National Football League*, 231 F.2d 620 (9th Cir. 1956).<sup>3</sup>

With the Supreme Court having rendered decisions regarding the status of professional boxing<sup>4</sup> and professional baseball<sup>5</sup> under the anti-trust laws, litigation concerning professional football was inevitable. The majority opinion in *Toolson v. New York Yankees*,<sup>6</sup> following *Federal Baseball Club v. National League*<sup>7</sup> unequivocally stated that Congress, by its silence, had exempted baseball from the Sherman Act. Although the

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1. "Shortly stated, the reserve clause in a player's contract ties the player to his club and he cannot go to another club without the consent of the club holding his contract." *Radovich v. National Football League*, 231 F.2d 620, 621 (9th Cir. 1956).

2. 26 STAT. 209 (1890), 15 U.S.C. §§ 1, 2 (1952). The applicable sections of the statute are: § 1 "Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal. . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and . . . shall be punished. . . ." § 2 "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and . . . shall be punished. . . ."

3. *Radovich v. National Football League*, 231 F.2d 620 (9th Cir. 1956).

4. *United States v. International Boxing Club*, 348 U.S. 236 (1955).

5. *Toolson v. New York Yankees*, 346 U.S. 356 (1953).

6. 346 U.S. 356 (1953).

7. 259 U.S. 200 (1922).

*Toolson* case is arguably judicial legislation,<sup>8</sup> the fact remains that the Supreme Court has held that baseball is not within the scope of the federal anti-trust laws. However, in *United States v. International Boxing Club*<sup>9</sup> the Court indicates that the *Toolson* decision is to be limited to baseball. The *Toolson* case immunizes neither business built around the live presentation of local exhibitions,<sup>10</sup> nor such businesses as involve exhibitions of an athletic nature.<sup>11</sup> Since the Sherman Act applies to service industries,<sup>12</sup> the question arises as to where professional football stands in relation to the anti-trust laws. Undoubtedly professional football, like baseball, with its complex organization and activity falls within the language of the Sherman Act as being both "interstate" and "commerce."<sup>13</sup> However, considering the *Toolson* and the *International Boxing Club* cases together the conclusion is inevitable that the immunity created by the Court exists only for baseball. The court in the instant case, in attempting to create a further exemption from anti-trust legislation departs from a long line of authority holding that the power to grant exemptions lies with Congress and not with the courts.<sup>14</sup> Congress has exempted certain specific activities from the Sherman Act,<sup>15</sup> but professional football is not one of them. The

8. In 1951 a congressional subcommittee indicated its opposition to the introduction of bills which would grant an exemption "to organized professional sports enterprises" under the Sherman Act. The subcommittee stated: "Four bills have been introduced into Congress, three in the House, one in the Senate, intending to give baseball and all other professional sports a complete and unlimited immunity from the anti-trust laws. The requested exemption would extend to all professional sports enterprises and to all acts in the conduct of such enterprises. The law would no longer require competition in any facet of business activity of any sport enterprise. Thus the sale of radio and television rights, the management of stadia, the purchase and sale of advertising, the concession industry, and many other business activities, as well as the aspects of baseball which are related to the promotion of competition on the playing field, would be immune and untouchable. Such a broad exemption could not be granted without substantially repealing the antitrust laws." H.R. 4229, 4230, 4231, 82d Cong., 1st Sess. (1951); S. 1526, 82d Cong., 1st Sess. (1951); H.R. REP. NO. 2002, 82d Cong., 2d Sess. 230 (1951).

9. 348 U.S. 236 (1955). The *Toolson* case was not followed; it was held that the promotion of professional championship boxing contests on a multistate basis was within the Sherman Act.

10. *United States v. Shubert*, 348 U.S. 222, 227 (1955).

11. *United States v. International Boxing Club*, 348 U.S. 236, 239 (1955).

12. *United States v. National Association of Real Estate Boards*, 339 U.S. 485 (1950).

13. For cases defining "interstate" and "commerce," see, *United States v. Shubert*, 348 U.S. 222, 227 (1955); *Times-Picayune Publishing Company v. United States*, 345 U.S. 594, 602 (1953); *Lorain Journal v. United States*, 342 U.S. 143, 151-152 (1951); *United States v. Paramount Pictures*, 334 U.S. 131 (1948); *United States v. Yellow Cab Company*, 332 U.S. 218, 226 (1947); *Associated Press v. United States*, 326 U.S. 1 (1945); *United States v. Crescent Amusement Company*, 323 U.S. 173, 183 (1944); *American Medical Association v. United States*, 317 U.S. 519 (1943); *Hart v. B. F. Keith Vaudeville Exchange*, 262 U.S. 271, 274 (1923).

14. *United States v. South Eastern Underwriters Association*, 322 U.S. 533 (1944); *United States v. Crescent Amusement Company*, 323 U.S. 173 (1944); *United States v. Cooper Corporation*, 312 U.S. 600, 602 (1941); *United States v. Trenton Pottery Company*, 273 U.S. 392, 397 (1927); *Northern Securities v. United States*, 193 U.S. 197 (1904).

15. 38 STAT. 731 (1914), 15 U.S.C. § 17 (1952) (Labor Organizations); 42 STAT. 388 (1922), 7 U.S.C. §§ 291, 292 (1952) (Farm Cooperatives); 59 STAT. 34 (1945), 15 U.S.C. § 1013 (1952) (Insurance). See also: *Apex Hosiery Company v. Leader*, 310 U.S. 469, 501 (1940) (Labor Organizations).

instant decision is contrary to a finding of a congressional subcommittee concerning the exemption of athletic exhibitions from the Sherman Act,<sup>16</sup> yet, it does not have the justification of the *Toolson* case that baseball is our "great national pastime," nor a decision of thirty years standing on which to rely.

It is difficult to perceive the instant decision being upheld. If the decision is allowed to stand on the basis of Judge Chambers' "more like" test, suggesting that all team sports are immune from the Sherman Act,<sup>17</sup> the baseball exemption will extend not only to football but to other professional team sports such as basketball and hockey. Yet, it seems safe to state that the *International Boxing Club* decision has given fair warning that the judicial immunity awarded to baseball by the *Toolson* case is to be narrowly construed, and will not be afforded to athletic exhibitions of any other type.<sup>18</sup>

*Anthony L. Bartolini*

#### BANKRUPTCY—PREFERENCES—SECTION 67(c)— CHattel MORTGAGE AS A STATUTORY LIEN.

*In the Matter of Quaker City Uniform Co. (3d Cir. 1956).*

The trustee in bankruptcy sold certain property, subject to two chattel mortgages, with the consent of the mortgagees. In distributing the proceeds of sale the referee declared the following priorities: chattel mortgagees' claim; administration expenses; wage claims; and the landlord's claim for rent. The district court, recognizing the superiority of the landlord's lien to the lien of a chattel mortgagee under Pennsylvania law, amended the order of distribution to read: the landlord's claim for rent; the claims of the chattel mortgagees; administration expenses; and wage claims. The court of appeals *held* that a chattel mortgage is a "statutory lien" within the meaning of section 67(c) of the Bankruptcy Act and was thereby postponed to the payment of administration expenses and wage claims; and secondly, that under Pennsylvania law the landlord's claim takes priority over the claim of a chattel mortgagee. The order of distribution then was arranged as follows: administration expenses; wage

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16. H.R. REP. No. 2002, 82d Cong., 2d Sess. 230 (1951).

17. *Radovich v. National Football League*, 231 F.2d 620, 622 (9th Cir. 1956).

18. If the decision were to be affirmed it would probably have to rest on the alternate grounds that plaintiff having failed to allege facts showing actual restraint fails to state a cause of action. *Radovich v. National Football League*, 231 F.2d 620, 621-622 (9th Cir. 1956).

claims; the landlord's claim; and claims of the chattel mortgagees. *In the Matter of Quaker City Uniform Co.*<sup>1</sup>

Prior to the adoption of the Chandler Act<sup>2</sup> in 1938 and its subsequent revision in 1952,<sup>3</sup> there would have been no question of a chattel mortgagee's priority over administration expenses and wage claims in the order of distribution of proceeds of the sale of mortgaged assets.<sup>4</sup> However, state-created priorities in the guise of liens<sup>5</sup> threatened federal control of priorities and dictated the revision brought about by section 67(c).<sup>6</sup> The revised section postponed "statutory liens" to the payment of administration costs and wage claims. Concern then draws us to question the meaning of "statutory liens" as enunciated by section 67(c), and whether it includes chattel mortgages. There is a paucity of judicial authority on the point.<sup>7</sup> The instant case in interpreting the act answers the question in the affirmative. This resolution avoids the district court's

1. *In the Matter of Quaker City Uniform Co.*, 135 LEGAL INTELLIGENCER No. 25, p.1, col. 3 (3d Cir. July 27, 1956).

2. 52 STAT. 874 (1938), 11 U.S.C. § 104 (1952); 52 STAT. 875 (1938), 11 U.S.C. § 107 (1952). The pertinent parts are: § 64(a) "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates; and the order of payment, shall be (1). . . enumerating various administration expenses]; (2) wages not to exceed \$600 to each claimant. . . ." § 67(c) "Where not enforced by sale before the filing of a petition initiating a proceeding under this title, and except where the estate of the bankrupt is solvent; (1) though valid against the trustee under subdivision (b) of this section, statutory liens, including liens for taxes or debts owing to the United States or to any State or subdivision thereof, on personal property not accompanied by possession of such property, and liens, whether statutory or not, of distress for rent shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision (a) of section 104 [section 64 of the Bankruptcy Act] of this title. . . ."

3. 52 STAT. 874 (1938), as amended, 11 U.S.C. § 104 (1952); 52 STAT. 875 (1938), as amended, 11 U.S.C. § 107 (1952).

4. See *Ginsberg v. Lindel*, 107 F.2d 721 (8th Cir. 1939); *Ingram v. Coos County*, 71 F.2d 889 (9th Cir. 1934); *In re Brannon*, 62 F.2d 959 (5th Cir. 1933); *In re Edmunds*, 27 F. Supp. 196 (W.D. Pa. 1939).

5. "Clause (2) obviously furthers the policy recognized in §§ 64a and 67c as written into the Chandler Act of 1938, to protect unsecured creditors against state created priorities and 'floating liens' thought to be essentially indistinguishable from priorities." 4 COLLIER, BANKRUPTCY 195 (14th ed. 1942). Of this type of statute would be the New York Workman's Compensation Act awarding a lien against assets of the employer. See *Halpert v. Industrial Commissioner*, 147 F.2d 375 (2d Cir. 1945).

6. 4 COLLIER, BANKRUPTCY 189 (14th ed. 1942) in analyzing the congressional bill (H.R. 12889, 74th Cong., 2d Sess. (1936)) states the policy underlying section 67(c): "As a result of long inaction of tax authorities, liens for taxes which had accumulated over a number of years often consumed a bankrupt's entire estate, even to the exclusion of costs and expenses of the bankruptcy proceedings. Statistics compiled by the Attorney General demonstrated that rent liens often consumed a very substantial portion of an estate and indeed the whole estate if not large. This situation was further aggravated by the growth of special legislation favoring public and private claims by granting liens to secure them. To afford protection to administration costs and expenses and to wage claims, the authors of subdivision b [of § 67] which expressly reaffirmed the validity of statutory liens, collaborated in a limited subordination of those liens."

7. The court in *In re Consorto Construction Co.*, 212 F.2d 676, 680 (3d Cir. 1954) has this to say: "Under the common law of Pennsylvania chattel mortgages were viewed with disfavor. Any such attempt to mortgage personality which was left in the possession of the mortgagor did not give the mortgagee any lien or legal priority over other creditors. . . . This background considered, the Pennsylvania courts have rather clearly indicated their view that the limited effect of the 1945 Chattel Mortgages Act has been to create a new statutory lien. . . ." However this is not stated as an interpretation of section 67(c).

problem of circuity of liens.<sup>8</sup> However, in *New Orleans v. Harrell*,<sup>9</sup> a city tax lien was expressly postponed, as a "statutory lien" under section 67(c), to the payment of administration expenses and wage claims, while a chattel mortgagee was allowed full payment from the proceeds of sale of the mortgaged chattel minus only the estimated cost of foreclosing the mortgage. The court then categorically stated that the validity of the chattel mortgage is undisputed, and that it is unaffected by bankruptcy,<sup>10</sup> clearly indicating that it does not consider a chattel mortgage as a "statutory lien" under section 67(c).

Considering the policy<sup>11</sup> underlying the change wrought by section 67(c) of the Bankruptcy Act, it is difficult to visualize Congress intending to characterize a chattel mortgage as a "statutory lien." Since a chattel mortgage was unaffected by the bankruptcy of the mortgagor prior to 1938,<sup>12</sup> such a drastic change as the court proposes in the instant case would make the lack of litigation on the question most difficult to explain. Further, under the court's interpretation, it is easy to visualize a situation wherein a chattel mortgagee's security could be exhausted in financing an entire bankruptcy proceeding. If the court's interpretation of section 67(c) of the Bankruptcy Act prevails, then the value of a chattel mortgage as a bankruptcy-proof security device is destroyed.

Anthony L. Bartolini

#### CONSTITUTIONAL LAW—FEDERAL CORRUPT PRACTICES ACT— PROHIBITION OF UNION POLITICAL EXPENDITURES.

*United States v. International Union United Automobile Workers,  
UAW-CIO* (E.D. Mich. 1956).

Defendant was indicted for allegedly violating § 610 of the Federal Corrupt Practices Act.<sup>1</sup> It was charged that the Union drew a specific

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8. Under Pennsylvania law the lien of the landlord is superior to that of the chattel mortgagee and takes priority. *Ferbo Trading Corp. v. Jo-Mar Dress Corp.*, 78 Pa. D.&C. 337 (C.P., Lack. 1951); *Commercial Credit Plan v. Mahoney*, 67 Pa. D.&C. 577 (C.P., Erie 1949). If we say then, that a chattel mortgage is *not* postponed by section 67(c), it necessarily follows that it has priority over the landlord's lien which is expressly postponed. Yet, as stated, the Pennsylvania law gives priority to the landlord's lien, thus leading to a circuity of liens. This was solved by the district court in the instant case by giving the landlord's lien the place of superiority it has under Pennsylvania law and ending the circuity there. Granted, it was a rather arbitrary method, but it certainly seems better than the solution adopted by the court of appeals, for in ending the circuity the court of appeals destroys the value of the chattel mortgage.

9. 134 F.2d 399 (5th Cir. 1943).

10. "The validity of the chattel mortgage liens is undisputed and it is well settled that when property so encumbered is sold in a bankruptcy proceeding for an amount not exceeding the balance of the mortgage debt, the creditor holding such lien, provided it is a first lien, is entitled to the entire proceeds of the sale, less only the estimated costs of foreclosure under the state law." *New Orleans v. Harrell*, 134 F.2d 399, 400 (5th Cir. 1943). *Accord, In re Danielle Co.*, 117 F. Supp. 178 (D.C. P.R. 1953).

11. See note 6 *supra*.

12. See note 4 *supra*.

1. "It is unlawful for . . . any labor organization to make a contribution or expenditure in connection with any election at which . . . a Senator or Representative

sum from its general treasury to defray the costs of certain union-sponsored broadcasts from a commercial television station; that the broadcasts advocated selection by the general electorate of certain persons as candidates for representatives and senator to the Congress of the United States in the primary and general elections of 1954; that the defendant thereby intended to influence the results of the election; and, further, that the sum paid was not obtained from voluntary political contributions or subscriptions from the union members, and was not paid for by advertising or sales. Defendant's motion to dismiss the indictment was granted on the grounds that the expenditures charged were not prohibited by the Act. *United States v. International Union United Automobile Workers, UAW-CIO*, 138 F. Supp. 53 (E.D. Mich. 1956).<sup>2</sup>

Historically, federal legislation has touched this type of political activity in some measure since 1907.<sup>3</sup> Federal regulation of political contributions was early upheld as constitutional.<sup>4</sup> Today the real problem pivots upon the proper construction of the term "expenditure" which was added as a part of permanent legislation in 1947.<sup>5</sup> As early as 1944 there was some doubt as to the constitutionality of adding the term,<sup>6</sup> and, with the advent of the Labor Management Relations Act of 1947, a stir of conflicting public opinion raged over the *meaning* of "expenditure" as well.<sup>7</sup> The chief difficulty seems to be that the intent of Congress in adding the word "expenditure" is not clear, probably because of scant testimony and debate on the section.<sup>8</sup> There have been only three other decided cases interpreting this provision.<sup>9</sup> In each the defense attacked the prohibition as an unconstitutional abridgment of the first amendment,<sup>10</sup> along with other amendments,<sup>11</sup> or as not describing the

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... are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices . . ." 18 U.S.C. § 610 (1952).

2. *United States v. International Union United Automobile Workers, UAW-CIO*, 138 F. Supp. 53 (E.D. Mich. 1956).

3. The original Act of 1907 was confined to national banks and corporations, and only prohibited "money contributions" in relation to certain elections. In 1925, the term became simply "contribution." The War Labor Disputes Act of 1943 temporarily included labor unions. In 1947, the Labor Management Relations Act included unions on a permanent basis, added the word "expenditure", and extended its prohibition to primaries, conventions, and caucuses.

4. *Ex parte Curtis*, 106 U.S. 371 (1882) which found the congressional power vested by U.S. CONST. art. I, § 4, cl. 1.

5. Labor Management Relations Act, 1947, 61 STAT. 159 (later amended by 65 STAT. § 718 (1951), 18 U.S.C. § 610 (1952)).

6. S. REP. No. 101, 79th Cong., 1st Sess. 83 (1945).

7. *E.g.*, New York Times, June 21, 1947, p. 2, col. 7, June 29, 1947, p. 1, col. 6; New York Herald Tribune, July 11, 1947, p. 1, col. 3, July 16, 1947, p. 3, col. 2.

8. *United States v. CIO*, 335 U.S. 106, 116, 134 (1948); Comment, 57 YALE L.J. 806, 807 n. 6 (1948).

9. *United States v. CIO*, 335 U.S. 106 (1948); *United States v. Painters Local 481*, 172 F.2d 854 (2d Cir. 1949); *United States v. Construction & General Laborers Local 264*, 101 F. Supp. 869 (W.D. Mo. 1951).

10. *United States v. CIO*, 335 U.S. 106, 109 (1948); *United States v. Painters Local 481*, 172 F.2d 854, 856 (2d Cir. 1949); *United States v. Construction & General Laborers Local 264*, 101 F. Supp. 869, 870 (W.D. Mo. 1951).

11. U.S. CONST. amend., V, VI, IX, X, XVII.

violation charged.<sup>12</sup> The lack of agreement as to the congressional intent has led to a division in judicial interpretation.<sup>13</sup> Many opinions have used this lack of agreement as an escape route. The courts, believing themselves faced with the possibility of deciding a constitutional question adversely,<sup>14</sup> have applied the maxim of interpreting a statute so as to avoid unconstitutionality.<sup>15</sup> Others have declared the section unconstitutional, largely because of its vagueness, by applying the rule that any attempt to restrict the liberties protected by the first amendment must be justified by clear public interest threatened by a "clear and present danger,"<sup>16</sup> and that legislative judgment, when it restricts first amendment rights, is not entitled to the same presumption of validity as in other regulatory laws.<sup>17</sup> The majority opinion in *United States v. CIO*,<sup>18</sup> reflects the first viewpoint, and the minority opinion the second. Clearly the case at hand as well as the other two decided cases follow this majority opinion.<sup>19</sup>

Does the instant case follow *United States v. C.I.O.* too blindly? The court found the facts here to be on all fours<sup>20</sup> with *United States v. Painters Local 481*,<sup>21</sup> which in turn followed *United States v. CIO*<sup>22</sup> without distinguishing. That failure to distinguish was not even discussed in this case although it has been adversely criticized,<sup>23</sup> and despite the

12. *United States v. Construction & General Laborers Local 264*, 101 F. Supp. 869, 870 (W.D. Mo. 1951).

13. *United States v. CIO*, 77 F. Supp. 355, 357 (D. D.C.), *aff'd*, 335 U.S. 106, 112, 153 (1948); *United States v. Painters Local 481*, 79 F. Supp. 516, 519 (D. Conn. 1948), *rev'd*, 172 F.2d 854, 856 (2d Cir. 1949); *United States v. Construction & General Laborers Local 264*, 101 F. Supp. 869, 876 (W.D. Mo. 1951).

14. *United States v. CIO*, 335 U.S. 106, 120, 121 (1948); *United States v. Construction & General Laborers Local 264*, 101 F. Supp. 869, 875 (W.D. Mo. 1951).

15. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936). *But see, United States v. Sullivan*, 332 U.S. 689, 693 (1948); *United States v. Raynor*, 302 U.S. 540, 552 (1938).

16. *Schenck v. United States*, 249 U.S. 47, 52 (1919). *But see, United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

17. *Thomas v. Collins*, 323 U.S. 516, 530 (1944); *Thornhill v. Alabama*, 310 U.S. 88, 95, 96 (1940); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). *But see, United States v. Painters Local 481*, 79 F. Supp. 516, 522 (D. Conn. 1948).

18. 335 U.S. 106 (1948).

19. "Because of the similarity of the facts before us to those in the CIO decision . . . we do not feel free to regard the issue of constitutionality. . . . Under the circumstances we are constrained to hold that the statute did not cover the publication effected by the defendants. . . ." *United States v. Painters Local 481*, 172 F.2d 854, 856 (2d Cir. 1949). ". . . We try to follow the law as laid down by our Supreme Court and there is no difficulty in doing so here." *United States v. International Union United Automobile Workers, UAW-CIO*, 138 F. Supp. 53, 55, 59 (E.D. Mich. 1956). "Conforming to the view expressed . . . in the CIO case . . . the motion . . . of acquittal . . . is hereby sustained." *United States v. Construction & General Laborers Local Union No. 264*, 101 F. Supp. 869, 877 (W.D. Mo. 1951).

20. *United States v. International Union United Automobile Workers, UAW-CIO*, 138 F. Supp. 53, 56 (E.D. Mich. 1956).

21. 172 F.2d 854 (2d Cir. 1949).

22. 335 U.S. 106 (1948).

23. 49 COLUM. L. REV. 1152 (1949); 7 WASH. & LEE L. REV. 87 (1950).



fact that the legislative history seems to speak of this very fact situation as a violation<sup>24</sup> of Section 610. Because of its present importance and the sharp cleavage in opinion, a more definitive interpretation of this section would be helpful and may be expected.

Thomas E. Eichman

CONSTITUTIONAL LAW—OCCUPANCY OF THE FIELD—  
SUPERSESION OF PENNSYLVANIA SEDITION ACT  
BY SMITH ACT OF 1940.

*Commonwealth v. Nelson* (U.S. 1956).

The defendant was convicted of violating the Pennsylvania Sedition Act.<sup>1</sup> The indictment charged acts of sedition against the United States Government. No evidence was introduced of such acts having been committed against the State of Pennsylvania. The Supreme Court of the United States in affirming the decision of the Pennsylvania Supreme Court *held* that in view of the evident Congressional intent to pre-empt the field of sedition, the predominant federal interest in that field, and the danger of conflict between enforcement of state sedition acts and the administration of the federal program, the Smith Act of 1940<sup>2</sup> superseded the Pennsylvania Sedition Act and precluded its enforcement against persons charged with acts of sedition against the federal government. *Commonwealth v. Nelson*, 350 U.S. 497 (1956).<sup>3</sup>

The federal government is one of delegated powers and those powers not delegated are reserved to the states.<sup>4</sup> Where the subject matter of regulation is national in character and admits of only uniform control, power to regulate lies exclusively with Congress.<sup>5</sup> However, if the subject matter of regulation does not demand uniformity, either the state or federal government may act.<sup>6</sup> When such concurrent power exists, and there is but a partial exercise of its regulatory power by the federal government,

24. See Senator Taft's answers to Senator Pepper's and Senator Taylor's questions in 93 CONG. REC. 6439, 6447 (1947).

1. PA. STAT. ANN. tit. 18, § 4207 (Supp. 1955).

2. 18 U.S.C. § 2385 (1952).

3. *Commonwealth v. Nelson*, 350 U.S. 497 (1956).

4. U.S. CONST. amend. X.

5. *Minnesota Rate Cases*, 230 U.S. 352 (1913); *Leisy v. Hardin*, 135 U.S. 100 (1890); *Bowman v. Chicago & Northwestern Ry.*, 125 U.S. 465 (1888); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851). But where federal legislation authorizes state action, such state action is permissible even as to matters which could otherwise be regulated only by uniform national enactments. *Kentucky Whip & Collar Co. v. Illinois Cent. R.R.*, 299 U.S. 334 (1937); *In re Rahrer*, 140 U.S. 545 (1891).

6. *California v. Thompson*, 313 U.S. 109 (1941); *Willson v. Blackbird Creek Marsh. Co.*, 27 U.S. (2 Pet.) 245 (1829).

the states may freely legislate in those areas not covered by federal legislation.<sup>7</sup> But once the United States has legislated in such a manner as to conflict with the law of a state either specifically<sup>8</sup> or by implication,<sup>9</sup> the state law becomes inoperative and the federal law is supreme.<sup>10</sup> Further, if Congress has intended to "occupy the field," the state law is automatically superseded and conflict between the state and federal laws is not necessary.<sup>11</sup> If this intent is not express, it may be implied in the type of law enacted by Congress. This is the "pre-emption doctrine," which has been formulated by the Supreme Court to deal with cases involving powers which the federal government derives from the commerce clause of the Constitution.<sup>12</sup> However, it has been applied to strike down a state law demanding the registration of aliens,<sup>13</sup> due to the effect state regulation of that subject would have upon international relations.<sup>14</sup> During periods in which the federal government was not legislating against sedition, the states' power to so legislate was recognized by the courts.<sup>15</sup>

In the instant case, the Supreme Court has applied the rule that Congress may pass a law which, by implication, will supersede the laws of the states upon the subject. It is questionable whether this rule, hitherto applied only to cases falling within the commerce clause and the subject of international relations, should be extended to further curtail the police power of the states. The position taken by the majority that the implied intent of Congress was to occupy the field of sedition appears indefensible in the face of two factors. First, Congress did not expressly bar state legislation in the field, in spite of the fact that it knew at the time of the Smith Act's passage that many states had already so legislated.<sup>16</sup> Secondly,

7. *Hartford Accident & Indemnity Co. v. Illinois*, 298 U.S. 155 (1936); *Northwestern Bell Tel. Co. v. Ry. Comm'n.*, 297 U.S. 471 (1936); *Whipple v. Martinson*, 256 U.S. 41 (1921); *Merchants Exchange v. Missouri*, 248 U.S. 365 (1919); *Minnesota Rate Cases*, 230 U.S. 352 (1913).

8. 61 STAT. 146, 29 U.S.C. § 160(a) (1952).

9. *Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Co.*, 314 U.S. 498 (1942); *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Missouri Pac. v. Porter*, 273 U.S. 341 (1927); *Napier v. Atlantic Coast Line*, 272 U.S. 605 (1926); *Oregon-Washington R. & Nav. Co. v. Washington*, 270 U.S. 87 (1926) (amendment to meet decision); *New York Cent. R.R. v. Winfield*, 244 U.S. 147 (1917); *Adams Express Co. v. Croninger*, 226 U.S. 491 (1912); *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1906).

10. It has been held that there should be a repugnance or conflict which is direct and positive in order for a state law to be superseded. *Kelly v. Washington*, 302 U.S. 1 (1937); *Carey v. South Dakota*, 250 U.S. 118 (1919); *Savage v. Jones*, 225 U.S. 501 (1911); *Missouri K. & T. Ry. v. Haber*, 169 U.S. 613 (1898); *Sinnot v. Davenport*, 63 U.S. (22 How.) 227 (1859).

11. *Charleston & Western Carolina Ry. v. Varnville Furniture Co.*, 237 U.S. 597 (1915).

12. U.S. CONST. art. I § 8, cl. 3.

13. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

14. *Cf. Allen-Bradley Local No. 1111, United Elec. Workers v. Board*, 315 U.S. 740 (1942).

15. *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925); *Commonwealth v. Lazar*, 103 Pa. Super. 417, 157 Atl. 701 (1931), *appeal dismissed*, 286 U.S. 532 (1932).

16. *Hearings before Subcommittee No. 3, Committee on the Judiciary, House of Representatives on H.R. 5138*, 76 Cong., 1st sess. pp. 7, 69, 83-85.

section 3231 of the Smith Act,<sup>17</sup> a section commonly employed in federal criminal statutes, has formerly been interpreted by the Supreme Court to mean that the states may legislate in the same field, absent an express congressional prohibition.<sup>18</sup> While the states are left free to protect themselves against acts of sedition aimed at their own internal government,<sup>19</sup> the effect of the decision is to render void similar statutes of twenty-three states which prohibit sedition against the federal government.<sup>20</sup>

*Burchard V. Martin*

CRIMINAL PROCEDURE—SEARCHES AND SEIZURES—  
ADMISSIBILITY OF EVIDENCE—STANDING TO OBJECT.

*People v. Kitchens* (Cal. 1956).

Defendant was found guilty of possessing marijuana. The principal evidence against him, a small plastic bottle of marijuana taken from his clothing, was found by the court to have been obtained by a search and seizure of questionable legality. Defendant was on another's premises at the time of the search and disclaimed any proprietary interest in the seized marijuana. On appeal it was *held*, that since the case had been tried prior to the California Supreme Court decision rendering illegally obtained evidence inadmissible, the defendant would now have standing to object to the admission in evidence of the marijuana. A new trial was ordered to determine the legality of the search and seizure. *People v. Kitchens*, 294 P.2d 17 (Cal. 1956).<sup>1</sup>

California has recently adopted the long standing "federal" rule<sup>2</sup> prohibiting the admission of illegally obtained evidence.<sup>3</sup> But because there are many limitations and exceptions to the federal rule as applied

17. The section provides as follows: "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the states of all offenses against the laws of the United States. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof." 18 U.S.C. § 3231 (1952).

18. *Sexton v. People*, 189 U.S. 319 (1903). The interpretation placed by the Supreme Court in the *Nelson* case upon the intent of Congress in enacting the Smith Act created quite a reaction in Congress. A bill to prohibit future speculation by the Court upon the Congressional intent was introduced shortly after the decision was handed down. The bill, H. R. 3, 84th Cong., 2nd sess. (1956), is sponsored in the House by Congressman Smith, author of the original act, and in the Senate by Senator McClellan. It would allow Congressional legislation to supersede state legislation upon the same subject only when the intent of Congress to do so is expressly stated in the Act. 102 CONG. REC. 7085 (1956).

19. *Commonwealth v. Nelson*, 350 U.S. 497 (1956).

20. Digest of the Public Record of Communism in the United States 266-88 (1955).

1. *People v. Kitchens*, 294 P.2d 17 (Cal. 1956).

2. *McDonald v. United States*, 335 U.S. 451 (1948); *Weeks v. United States*, 232 U.S. 383 (1914); *Boyd v. United States*, 116 U.S. 616 (1886).

3. *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905 (1955).

in federal courts<sup>4</sup> and in state courts that have adopted the federal rule,<sup>5</sup> California has expressed its intention not to be bound by decisions applying the federal rule, but rather to develop a workable rule suited to its own court.<sup>6</sup> The general rule is that the right to object to illegally obtained evidence is personal to the one whose rights have been violated<sup>7</sup> and one who claims no proprietary interest in the thing seized or in the premises from which it has been taken can not object to the admission of the object in evidence.<sup>8</sup> But none of the decisions enunciating that principle have dealt with the seizure from the defendant's person, while on another's premises, of an object in which the defendant claims no proprietary interest. There is, however, authority in state and federal courts for the decision in the instant case. The necessity for proprietary interest in the seized object is excused for the purpose of excluding evidence illegally obtained where by statute there can be no property interest in the object.<sup>9</sup> And there is dictum to the effect that there is no reason why a defendant's standing to object should turn on the question of proprietary interest at all.<sup>10</sup> The policy of the exclusionary rule has always been to exclude evidence obtained by an illegal search either of the home or of the person.<sup>11</sup> State courts following the federal rule have long adopted the same policy.<sup>12</sup>

Much has been written pro and con the wisdom of adopting a rule that would exclude illegally obtained evidence. But once having done so, California has done well to extend its benefits to the defendant in the instant case. For if this defendant were refused standing to object to the admission of the marijuana in evidence on the ground that he claimed no

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4. *E.g.*, Evidence illegally obtained by state officers is admissible in a federal court if the state officers were not co-operating with federal officers. *Bryant v. United States*, 120 F.2d 483 (5th Cir. 1941); *United States v. Yee Doo*, 41 F.Supp. 939 (D.C. Cir. 1941). But such illegally obtained evidence is not admissible in federal courts where, even though there has been no direct co-operation, it is the practice to turn over to federal authorities offenders violating the federal and state law at the same time. *Lowrey v. United States*, 128 F.2d 477 (8th Cir. 1942).

5. *E.g.*, In some states illegally obtained evidence may only be excluded if there is a motion to suppress it before trial. *State v. Conner*, 59 Idaho 695, 89 P.2d 197, 201 (1939); *State v. Gunkel*, 188 Wash. 528, 63 P.2d 376 (1936). Other states allow the objection to be made during the trial. *Youman v. Commonwealth*, 189 Ky. 152, 224 S.W. 860 (1920).

6. *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, 915 (1955).

7. *Brubaker v. United States*, 183 F.2d 894, 897 (2d Cir. 1950); *Scoggins v. United States*, 202 F.2d 966, 968 (9th Cir. 1940); *State v. Cairo*, 74 R.I. 377, 60 A.2d 841, 845 (1948). California has chosen not to so limit the application of the exclusionary rule. "... Whenever evidence is obtained in violation of constitutional guarantees, such evidence is inadmissible whether or not it was obtained in violation of the particular defendant's constitutional rights." *People v. Martin*, 45 Cal.2d 755, 290 P.2d 855, 857 (1955).

8. *Ingram v. United States*, 113 F.2d 966, 968 (9th Cir. 1940); *Drake v. State*, 920 Okla. Crim. 253, 222 P.2d 770 (1950).

9. *United States v. Jeffers*, 342 U.S. 48, 51 (1951).

10. *United States v. Blok*, 188 F.2d 1019, 1031 (D.C. Cir. 1951).

11. *Snyder v. United States*, 285 Fed. 1, 3 (4th Cir. 1922).

12. *Allen v. State*, 183 Wis. 323, 197 N.W. 808 (1924).

proprietary interest in it, then only the guilty would benefit where the very possession of the object is the offense charged. Only one admitting to possession of the object, and thereby admitting his guilt, would be enabled to have the evidence suppressed.

Anthony J. Ryan

EVIDENCE—HEARSAY—CO-DEFENDANT'S CONFESSION IN A  
JOINT TRIAL FOR CONSPIRACY.

*United States v. Paoli* (2d Cir. 1956).

In a joint trial for conspiracy a confession by one of the defendants which implicated the appellant was admitted in evidence. The jury was instructed that it was admissible only against the declarant and was not to be considered in determining the guilt or innocence of the appellant. The appellant was denied his request to have those parts in the confession referring to him blackened out. The court of appeals, one Judge dissenting, affirmed the conviction *holding* that there was no abuse of discretion by the trial judge. *United States v. Paoli*, 229 F.2d 319 (2d Cir. 1956).<sup>1</sup>

Co-conspirators are "partners in crime,"<sup>2</sup> and therefore all acts, admissions and declarations of one are imputed to the others.<sup>3</sup> For the acts, admissions and declarations of one to be imputed to the others they must have occurred during the existence of the conspiracy, and must have been made in furtherance of it.<sup>4</sup> The acts of a conspirator done before the conspiracy was formed are not the liability of his co-conspirator.<sup>5</sup> But if a conspiracy is already in existence and subsequently another joins it, he is responsible for all acts done by the conspirators prior to his entering.<sup>6</sup> If, after the substantive crime is completed or abandoned, there is something still to be done in order to complete the conspiracy, the conspirators remain as agents for each other until such time as their

1. *United States v. Paoli*, 229 F.2d 319 (2d Cir. 1956).

2. *United States v. Kissel*, 218 U.S. 601, 608 (1910); *Van Riper v. United States*, 13 F.2d 961, 967 (2d Cir. 1926); *People v. Cooper*, 326 Mich. 514, 40 N.W.2d 708 (1950).

3. *Rose v. United States*, 149 F.2d 755 (2d Cir. 1945); *Minner v. United States*, 57 F.2d 506 (10th Cir. 1932).

4. *Krulewitch v. United States*, 336 U.S. 440 (1949); *Glasser v. United States*, 315 U.S. 60, 74 (1942) ". . . such relations are admissible . . . only if there is proof *aliunde* that he is connected with the conspiracy." *Logan v. United States*, 144 U.S. 263 (1892); MODEL CODE OF EVIDENCE rule 508(b) (1942).

5. *Minner v. United States*, 57 F.2d 506 (10th Cir. 1932); *People v. Fitzgerald*, 14 Cal. App. 2d 180, 58 Pac.2d 718 (1936); *State v. Richetti*, 342 Mo. 1015, 119 S.W.2d 330 (1938).

6. *State v. Richetti*, 342 Mo. 1015, 119 S.W.2d 330 (1938).

objectives are completed.<sup>7</sup> When a conspiracy is over, the acts and statements of one of its members are admissible as evidence only against the declarant, and are inadmissible hearsay as to the other alleged members,<sup>8</sup> even in a joint trial.<sup>9</sup> The admissibility of evidence against the declarant in a joint trial which is hearsay as to the others, is within the discretion of the court.<sup>10</sup> Hence, the general rule has developed that in a joint trial an admission or confession of one of the defendants, which is hearsay as to the others, is admissible as long as the court instructs the jury that it is to be used only in determining the guilt of the declarant and is to be totally disregarded when considering the fate of the others.<sup>11</sup>

While continuing to give this formal admonition in submitting such evidence to the jury, our courts have long recognized that ". . . in nine cases out of ten it is impossible for anyone, lay or legal, to divide his mind into proof-tight compartments and forget at one time what he must use at another."<sup>12</sup> Further, in the instant case both the majority and minority opinions agree that deleting the appellant's name would, due to the character of the other evidence introduced, serve only to underscore his guilt.<sup>13</sup> Since ". . . the evidence against Paoli—aside from Whitley's confession—was by no means overwhelming,"<sup>14</sup> the possibility that its admission influenced the jury in convicting Paoli is great. While precedent is against the appellant, Judge Frank, in his dissent, warns that ". . . in criminal actions where life or liberty is at stake, courts should not adhere to precedents unjust to the accused."<sup>15</sup> An escape from this dilemma might well lie in a change in the Federal Rules of Criminal Procedure requiring a judge to sever the trial of a defendant

7. *Murray v. United States*, 10 F.2d 409 (7th Cir. 1926); *State v. Larson*, 187 Wash. 96, 59 P.2d 1119 (1936).

8. *Krulewitch v. United States*, 336 U.S. 440 (1949); *Brown v. United States*, 150 U.S. 93 (1893); *Logan v. United States*, 144 U.S. 263 (1892). Especially inadmissible are narratives of the past acts of other alleged conspirators. *United States v. Goodman*, 129 F.2d 1009 (2d Cir. 1942).

9. *United States v. Kelinson*, 205 F.2d 600 (2d Cir. 1953); *Nash v. United States*, 54 F.2d 1006 (2d Cir. 1932); *Hale v. United States*, 25 F.2d 430 (8th Cir. 1928).

10. *United States v. Von Clemm*, 136 F.2d 968 (2d Cir. 1943).

11. *United States v. Leviton*, 193 F.2d 848 (2d Cir. 1951); *United States v. Gottfried*, 165 F.2d 360 (2d Cir. 1948); *Nash v. United States*, 54 F.2d 1006 (2d Cir. 1932); *Commonwealth v. Novak*, 165 Pa. Super. 576, 69 A.2d 86 (1949). In *United States v. Kelinson*, 205 F.2d 600 (2d Cir. 1953) it was error for the trial judge to admit such evidence without admonishing the jury. *Contra*, *Hale v. United States*, 25 F.2d 430 (8th Cir. 1928); *United States v. Leviton*, 193 F.2d 848 (2d Cir. 1951) (dissent). 4 OKLA. L. REV. 114 (1951).

12. *Van Riper v. United States*, 13 F.2d 961, 968 (2d Cir. 1926). "The naive assumption that all prejudicial effects can be overcome by instructions to the jury . . . ; all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453 (1949); ". . . it is inconceivable that the impression made upon the minds of the jurors could have been removed by these formal remarks of the court." *Hale v. United States*, 25 F.2d 430, 438 (8th Cir. 1928).

13. *United States v. Paoli*, 229 F.2d 319, 321, 324 (2d Cir. 1956).

14. *Id.* at 322.

15. *Id.* at 323.

indicted with another when evidence is to be introduced which, while admissible against that other, is hearsay and prejudicial to the complaining defendant.<sup>18</sup>

*Edward G. Mekel*

INSURANCE—ACCIDENTAL MEANS CLAUSE—  
DECEDENT'S CRIMINAL ACT.

*Taylor v. John Hancock Mutual Life Ins. Co.* (Ill. 1956).

Deceased, with others, plotted and prepared to burn a house to recover the insurance thereon. The conspirators had spread gasoline throughout the house when the deceased went inside in order to procure some articles for his own use. While he was inside the gasoline caught fire from an unknown cause, whereupon he was burned to death. Plaintiff, as beneficiary, brought suit to recover on an accident insurance policy, issued by the defendant, covering the deceased. The policy insured against bodily injuries sustained "solely through external, violent and accidental means, directly or independently of all other causes." The lower court rendered judgment in favor of the defendant. The Appellate Court of Illinois, one judge dissenting, reversed and *held* that the fire rather than the criminal act was the cause of death, and that the death was the result of an "accident" within the terms of the policy. *Taylor v. John Hancock Mutual Life Ins. Co.*, 9 Ill. App. 2d 330, 132 N.E.2d 579 (1956).<sup>1</sup>

Accident insurance policies are written to cover either accidental results or the results of an accidental cause or means. The federal courts and most of the earlier decisions in the state courts have recognized a distinction between these terms.<sup>2</sup> The words "accidental means" have been regarded as much narrower in scope than the words "accidental

16. *Id.* at 324. Judge Frank proposes this rule: "When several defendants are on trial for criminal conspiracy, if the government seeks to put in evidence an out-of-court statement by one defendant which is hearsay as to the others (i.e., an out-of-court statement made after the conspiracy has terminated), then

(a) unless all references to the other defendants can be effectively deleted (so that the statement will contain no hint of the others' guilt) and unless those references are deleted,

(b) the trial judge must (1) refuse to admit the statement or (2) sever the trial of those other defendants."

1. *Taylor v. John Hancock Mutual Life Ins. Co.*, 9 Ill.App.2d 330, 132 N.E.2d 579 (1956).

2. *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. 491 (1934); *Order of United Commercial Travelers v. Shane*, 64 F.2d 55 (8th Cir. 1933); *Olinsky v. Railway Mail Ass'n.*, 182 Cal. 669, 189 Pac. 835 (1920); *Szymanska v. Equitable Life Ins. Co.*, 37 Del. (7 Harr.) 272, 183 Atl. 309 (1936); *Smith v. Travelers' Ins. Co.*, 219 Mass. 147, 106 N.E. 607 (1914); *Conti v. Benefit Ass'n of Railway Employees*, 103 Pa. Super. 210, 158 Atl. 205 (1931).

injuries" or the word "accident."<sup>3</sup> Under these decisions it is generally held that a death or injury does not result from accidental means where it is the natural result of the insured's voluntary act unaccompanied by anything unforeseen except the death or injury.<sup>4</sup> A number of courts in this group, having softened this sharp distinction, allow recovery on a policy containing an accidental means clause if, in the act which precedes the death or injury, although an intentional act, something unforeseen, unexpected, and unusual occurs which produces the death or injury.<sup>5</sup> But, even under these decisions recovery has been denied where the insured, by an exercise of ordinary care, should have foreseen the occurrence because of material facts or circumstances known by him before the mishap.<sup>6</sup> Recognizing that "the attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog,"<sup>7</sup> a great number of the later decisions in the state courts have joined with a small minority of earlier cases in denying or repudiating any distinction between the terms "accidental means" and "accidental results" and, in so doing, treat the terms as legally synonymous.<sup>8</sup> The rationale of these decisions seems to be: if there has been an accidental result, there necessarily must have been an accidental means, the two being logically inseparable;<sup>9</sup> terms in insurance policies should be given ordinary and popular meaning according to common speech and usage;<sup>10</sup> and, coverage against accidental results was really within the contemplation of the parties.<sup>11</sup> Thus it seems that this line of authority would advocate recovery on all accidental injuries or deaths unless the insurer has excluded particular kinds by clear exceptions in its policy.

The case under discussion presents a situation in which the insured was engaged in voluntary, intentional activity. No doubt, an ordinary

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3. RICHARDS, LAW OF INSURANCE § 215 (5th ed. 1952).

4. *United Commercial Travelers v. Shane*, 64 F.2d 55 (8th Cir. 1933); *Losleben v. California State Life Ins. Co.*, 133 Cal. App. 550, 24 P.2d 825 (1933); *Mutual Benefit Health & Accident Ass'n v. Blanton*, 306 Ky. 16, 206 S.W.2d 70 (1947); *Lawrence v. Massachusetts Bonding & Insurance Co.*, 113 N.J.L. 265, 174 Atl. 226 (1934).

5. *United States Mutual Accident Association v. Barry*, 131 U.S. 100 (1889); *Zurich General Accident & Liability Ins. Co. v. Flickinger*, 33 F.2d 853 (4th Cir. 1929); *Schroeder v. Police And Firemen's Ins. Ass'n.*, 300 Ill.App. 375, 21 N.E.2d 16 (1939); *McGlinchey v. Fidelity & Casualty Co.*, 80 Me. 251, 14 Atl. 13 (1888).

6. *Aetna Life Ins. Co. v. Kent*, 73 F.2d 685 (6th Cir. 1934); *Szymanska v. Equitable Life Ins. Co.*, 37 Del. (7 Harr.) 272, 183 Atl. 309 (1936).

7. *Mr. Justice Cardozo*, dissenting in *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. 491 (1934).

8. *Wilson v. New York Life Ins. Co.*, 82 F. Supp. 292 (D. Idaho 1949), *aff'd*, 178 F.2d 534 (1949); *Travelers' Protective Ass'n v. Stephens*, 185 Ark. 660, 49 S.W.2d 364 (1932); *Equitable Life Assur. Soc. v. Hemenover*, 100 Colo. 231, 67 P.2d 80 (1937); *Burr v. Commercial Travelers Mutual Acc. Ass'n.*, 295 N.Y. 294, 67 N.E.2d 248 (1946).

9. *Murphy v. Travelers' Ins. Co.*, 141 Neb. 41, 2 N.W.2d 576 (1942); *Provident Life & Accident Ins. Co. v. Green*, 172 Okla. 591, 46 P.2d 372 (1935).

10. *Equitable Life Assur. Soc. v. Hemenover*, 100 Colo. 231, 67 P.2d 80 (1937); *Griswold v. Metropolitan Life Ins. Co.*, 107 Vt. 367, 180 Atl. 649 (1935); *Zinn v. Equitable Life Ins. Co. of Iowa*, 6 Wash.2d 379, 107 P.2d 921 (1940); *O'Connell v. New York Life Ins. Co.*, 220 Wis. 61, 264 N.W. 253 (1936).

11. *Travelers' Protective Ass'n v. Stephens*, 185 Ark. 660, 49 S.W.2d 364 (1932).



prudent man would consider it as inherently dangerous activity. Thus the fire unexpected as it may have been, was certainly not unusual, nor should it be considered as unforeseeable. It is hard to see how a court in a jurisdiction drawing the distinction between "accidental means" and "accidental results" could permit recovery in this situation and still recognize the distinction. Yet, the court in this case allowed recovery without repudiating former Illinois cases drawing the distinction.<sup>12</sup> The means used by the court to enable it to accomplish such a feat was the introduction into the controversy of the abstruse doctrine of proximate cause whereby the accidentally caused fire was isolated from all other previous transactions and made the accidental means or cause of the insured's death. Truly the prophesied "Serbonian Bog"!

*Michael J. Dempsey*

#### NEGLIGENCE—COMMUNITY PROPERTY—IMPUTATION TO HUSBAND OF DIVORCED WIFE'S CONTRIBUTORY NEGLIGENCE.

*Tinker v. Hobbs* (Ariz. 1956).

Plaintiff brought an action to recover for personal injuries arising from a collision between defendant's automobile and an automobile driven by plaintiff's wife in which he was a passenger. Subsequently the parties were divorced. At the trial the defendant presented evidence that the divorced wife had been guilty of contributory negligence. The trial court entered judgment upon the verdict for the defendant. On appeal the Supreme Court of Arizona held that under Arizona divorce law the divorced wife would have a direct interest in any recovery by the plaintiff, therefore, her negligence would have to be imputed to the plaintiff to avoid unjust enrichment of the divorced wife. *Tinker v. Hobbs*, 294 P.2d 659 (Ariz. 1956).<sup>1</sup>

Imputed negligence signifies that one is to be charged with the negligence of another.<sup>2</sup> Imputable contributory negligence which will bar a recovery exists when the person suffering injury, although not chargeable with negligence, has been exposed to the injury by the negligence of a person in privity with him.<sup>3</sup> The general rule in regard to husband and wife is that the contributory negligence of one spouse will not be imputed

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12. *Hutton v. States Accident Ins. Co.*, 267 Ill. 267, 108 N.E. 296 (1915); *Ebbert v. Metropolitan Life Ins. Co.*, 289 Ill.App. 342, 7 N.E.2d 336 (1937); *Wayne v. Travelers' Ins. Co.*, 220 Ill.App. 493 (1921).

1. *Tinker v. Hobbs*, 294 P.2d 659 (Ariz. 1956).

2. *Albert v. Maher Bros. Transfer Co.*, 215 Iowa 197, 243 N.W. 561 (1932).

3. *Smith v. New York Central R.R.*, 4 App. Div. 493, 38 N.Y. Supp. 666 (4th Dep't 1896).

to the other merely because of the existence of the marriage relation.<sup>4</sup> However, the contributory negligence of one spouse is imputed to the other in most of the eight community property states<sup>5</sup> to prevent a guilty spouse from profiting by his or her own negligence. The doctrine of community property is the result of statutes which differ slightly in the various states, but which have the general underlying principle that all property acquired by either spouse during the marriage, except that acquired by gift, devise or descent, shall be deemed the common property of the husband and wife.<sup>6</sup> The majority of states having such statutes hold that damages received in compensation for personal injuries to either spouse, or both, are community property,<sup>7</sup> and as a corollary of this doctrine the contributory negligence of one spouse is imputable to the other and will bar any recovery for damages for personal injuries sustained by the other spouse.<sup>8</sup> Nevada and New Mexico, although community property states, consider damages recovered for personal injuries to one spouse to be his or her separate property.<sup>9</sup> Hence, the contributory negligence of one spouse is not imputed to the other.<sup>10</sup> When there is a divorce in a community property state, any community property not disposed of in the decree of divorce becomes the property of the former spouses as tenants in common,<sup>11</sup> thus giving each spouse a direct interest in any damages recovered for personal injuries sustained during the marriage.

The Arizona Supreme Court in the instant case has rendered a decision which is consistent with its principle that damages recovered for personal injuries to either spouse are community property. By imputing the contributory negligence of one former spouse to the other

4. *Louisville, N. A. & C. Ry. v. Creek*, 130 Ind. 139, 29 N.E. 481 (1892); *Bartek v. Glasers Provisions Co.*, 160 Neb. 794, 71 N.W.2d 466 (1955); *Peskowitz v. Lawrence F. Framer, Inc.*, 105 N.J.L. 415, 144 Atl. 604 (Ct. Err. & App. 1929); *Anderson v. State*, 203 Misc. 1100, 121 N.Y.S.2d 673 (Ct. Cl. 1952), *aff'd*, 282 App. Div. 119, 121 N.Y.S.2d 678 (3rd Dep't 1953). Contributory negligence of one spouse will be imputed to the other if the negligent spouse is the agent of the other. *Sloan v. Farmer*, 168 S.W.2d 467 (Mo. 1943). In situations where the husband is the driver, the wife, lacking the right to control her husband's actions, is his guest and therefore his negligence can not be imputed to her. *Swartout v. Van Auken*, 132 Misc. 89, 228 N.Y. Supp. 732 (4th Dep't 1929).

5. Those states having community property laws are: Ariz., Cal., Idaho, La., N.M., Nev., Tex., and Wash.

6. CAL. CIV. CODE §§ 162, 163, 687 (Deering 1949); LA. CIV. CODE ANN. art. 2334 (West Supp. 1953); TEX. REV. CIV. STAT. art. 4619 (Supp. 1954).

7. *Scoville v. Kegler*, 27 Cal. App. 2d 17, 80 P.2d 162 (1938); *Labonte v. Davidson*, 31 Idaho 644, 175 Pac. 588 (1918); *H. T. Cab Co. v. Ginns*, 280 S.W.2d 360 (Tex. 1955).

8. *Bostick v. Texas & P. Ry.*, 81 S.W.2d 216 (Tex. 1935). *But see, Flores v. Brown*, 39 Cal.2d 622, 248 P.2d 922 (1952) (contributory negligence not imputed where the negligent spouse died as a result of the accident).

9. *Fredrickson & Watson Const. Co. v. Boyd*, 60 Nev. 117, 102 P.2d 627 (1940); *Soto v. Vandeverter*, 56 N.M. 483, 245 P.2d 826 (1952).

10. *King v. Yancey*, 147 F.2d 379 (9th Cir. 1945).

11. *Schwartz v. Durham*, 52 Ariz. 256, 80 P.2d 453 (1938); *Fieger v. Fieger*, 28 Cal. App. 2d 736, 83 P.2d 256 (1938); *Taylor v. Catalon*, 140 Tex. 38, 166 S.W.2d 102 (1943); *Olsen v. Roberts*, 42 Wash.2d 862, 259 P.2d 418 (1953).

it has prevented the negligent spouse from profiting by her own wrong, but on the other hand it has left the injured and innocent spouse without any legal remedy whatsoever. Thus, the harm resulting is as great as the good. A better approach to the problem is that of Nevada and New Mexico which hold as previously noted, that damages recovered for personal injuries are separate property. Arizona would provide a more just result by following the interpretation of the Nevada court, since damages recovered for personal injuries to a spouse are compensation for violation of a right which is personal only to the injured spouse and not to both of them.

*Francis P. Connors*

#### TAXATION—FEDERAL TAX LIENS—PRIORITY OVER STATUTORY MECHANIC'S LIEN.

*United States v. White Bear Brewing Co.* (U.S. 1956).

The United States instituted an action against a successor corporation and its mortgagee to have corporate realty sold to satisfy federal tax liens held against a predecessor in title. A statutory mechanic's lien against the property had been filed, and suit to foreclose the lien was brought on November 13, 1947. Judgment in favor of the lienor was entered on April 28, 1949. The lienor purchased the property at the foreclosure sale and assigned to one Yavitz who conveyed to the defendant. Assessment lists against the predecessor corporation had been received by the Collector of Internal Revenue on November 17, 1947, December 17 and 22, 1948. The district court granted a motion to dismiss the complaint and the government appealed. The court of appeals affirmed, *holding* that the mechanic's lien was superior to the government's tax lien.<sup>1</sup> The Supreme Court with Justices Douglas and Harlan dissenting reversed per curiam. *United States v. White Bear Brewing Co.*, 76 Sup. Ct. 646 (1956).<sup>2</sup>

The United States has a statutory lien on all the property of a delinquent taxpayer.<sup>3</sup> In the absence of a specific statutory declaration to the contrary, this lien arises at the time the assessment list is received by the Collector of Internal Revenue for the taxpayer's district.<sup>4</sup> Congress has nowhere, save in the case of insolvent taxpayers,<sup>5</sup> provided for the priority of tax liens over other liens. Coupled with this congressional silence is the fact that the United States has no sovereign common-law

1. *United States v. White Bear Brewing Co.*, 227 F.2d 359 (7th Cir. 1955).

2. *United States v. White Bear Brewing Co.*, 76 Sup. Ct. 646 (1956).

3. Int. Rev. Code of 1939, § 3670, 53 STAT. 448.

4. Int. Rev. Code of 1939, § 3671, 53 STAT. 449.

5. REV. STAT. § 3466 (1875), 31 U.S.C. 191 (1952).

priority.<sup>6</sup> The question has been resolved by application of the common-law rule that the lien which is prior in time is entitled to prior satisfaction.<sup>7</sup> But in addition to being prior in time, a lien to be favored over a tax lien, must have that degree of specificity and perfection which will render it choate.<sup>8</sup> A choate lien is one in which the identity of the lienor, the amount of the lien, and the property to which it attaches have been established.<sup>9</sup> Because a tax lien is choate as of the time the assessment list is received by the collector,<sup>10</sup> a rival lien in order to be favored must be perfected before such receipt.<sup>11</sup> In the instant case the lienholder had recorded his lien for a specific amount and instituted his suit to enforce the lien before the assessment lists were received.<sup>12</sup> Since the lienholder is identified, the amount of the lien established, and the lien property ascertained, upon application of the test outlined in two leading cases<sup>13</sup> the mechanic's lien was choate *before* the taxes were assessed and consequently before the government's lien could arise.<sup>14</sup>

The Court in the instant case has left the law on this question in a state of hopeless confusion, more so since the decision was *per curiam*. Since no reasons are given for reversing the court below, the test as to when, if ever, a lien may take precedence over a tax lien is unascertainable. In any event the rule that the first choate lien which arises is to be granted priority is apparently gone. In the words of Justice Douglas: "The Court apparently holds that . . . , a lien that is specific and choate under state law, no matter how diligently enforced, can never prevail against a subsequent federal tax lien, short of reducing the lien to final judgment."<sup>15</sup>

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6. *United States v. Bank of North Carolina*, 31 U.S. (6 Pet.) 29 (1832). See also *Winston-Salem v. Powell Paving Co.*, 7 F.Supp. 424 (M.D. N.C. 1934); *In re Wyley Co.*, 292 F.Supp. 900 (N.D. Ga. 1923).

7. *Rankin v. Scott*, 25 U.S. (12 Wheat.) 177 (1827); *Macatee, Inc. v. United States*, 214 F.2d 717 (4th Cir. 1954); *United States v. Greenville*, 118 F.2d 963 (4th Cir. 1941); *Ersa, Inc. v. Dudley*, 134 F.Supp. 627 (W.D. Pa. 1955).

8. *United States v. Scovil*, 348 U.S. 218 (1955); *United States v. Acri*, 348 U.S. 211 (1955); *United States v. Liverpool & London & Globe Insurance Co.*, 348 U.S. 215 (1955); *United States v. City of New Britain*, 347 U.S. 81 (1954).

9. *United States v. City of New Britain*, 347 U.S. 81 (1954); *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362 (1946); *United States v. Albert Holman Lumber Co.*, 206 F.2d 685 (5th Cir. 1953).

10. *United States v. Greenville*, 118 F.2d 963 (4th Cir. 1941); *Metropolitan Life Insurance Co. v. United States*, 107 F.2d 311 (6th Cir. 1939), *cert. denied*, 310 U.S. 630 (1940); *United States v. Standard Brass & Manufacturing Co.*, 266 S.W.2d 407 (Tex. Civ. App. 1954).

11. *United States v. Atlantic Municipal Corp.*, 212 F.2d 709 (5th Cir. 1954); *Miller v. Bank of America*, 166 F.2d 415 (9th Cir. 1948); *Great American Indemnity Co. v. United States*, 120 F.Supp. 445 (W.D. La. 1954); *Fleming v. Brownfield*, 290 P.2d 993 (Wash. 1955); *Sams v. Chicago Title & Trust Co.*, 349 Ill. App. 413, 111 N.E.2d 172 (1953).

12. *United States v. White Bear Brewing Co.*, 76 Sup. Ct. 646 (1956) (dissenting opinion).

13. *United States v. City of New Britain*, 347 U.S. 81 (1954); *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362 (1946).

14. See note 4, *supra*.

15. *United States v. White Bear Brewing Co.*, 76 Sup. Ct. 647 (1956) (dissenting opinion).

WORKMEN'S COMPENSATION—EXCLUSIVENESS OF  
REMEDY—FAILURE TO PLEAD A REJECTION  
OF THE ACT.

*Hyzy v. Pittsburgh Coal Co.* (Pa. 1956).

The plaintiff, as administratrix of her husband's estate, brought a wrongful death action against his employer alleging the defendant's neglect of a statutory duty. The trial court sustained the defendant's demurrer. The Supreme Court of Pennsylvania *held* that where the complaint alleged a fatal injury in the course of employment, failure to allege a rejection of the Workmen's Compensation Act, was tantamount to pleading that the parties had accepted the act as part of the employment contract, and the complaint was therefore demurrable. *Hyzy v. Pittsburgh Coal Co.*, 384 Pa. 316, 121 A.2d 85 (1956).<sup>1</sup>

The Pennsylvania Workmen's Compensation Act makes the remedy given by the act exclusive,<sup>2</sup> and the courts of Pennsylvania have applied this provision literally.<sup>3</sup> The act provides that "In every contract of hiring . . . expressed or implied . . . , it shall be conclusively presumed that the parties have accepted the provisions" of the act unless written notice is given to the contrary.<sup>4</sup> Therefore, plaintiff-employees must affirmatively plead rejection of the act before they can proceed with another remedy.<sup>5</sup> The employer-defendant's violation of a statute is not of itself enough to excuse the injured employee from proceeding under the act,<sup>6</sup> although claims under the act by employees guilty of a similar infraction have been denied.<sup>7</sup> Regarding the legislative will, it has been suggested that the protection of the Workmen's Compensation Act ought not to be given the employer who contravenes a statutory command while it is denied the employee who does the same.<sup>8</sup> *Lincoln v. Nat. Tube*

1. *Hyzy v. Pittsburgh Coal Co.*, 384 Pa. 316, 121 A.2d 85 (1956).

2. Acceptance of the act ". . . shall operate as a surrender by the parties thereto of their rights to any form or amount of compensation or damages for any injury or death occurring in the course of employment, or to any method of determination thereof, other than as provided, in article three of this act. Such agreement shall bind the employer and his personal representatives, and the employee, his or her wife or husband, widow or widower, next of kin, and other dependents." PA. STAT. ANN. tit. 77 § 481 (Supp. 1955).

3. *McIntyre v. Strausser*, 365 Pa. 507, 76 A.2d 220 (1950); *Jackson v. Gleason*, 320 Pa. 545, 182 Atl. 498 (1936).

4. PA. STAT. ANN. tit. 77, § 461 (Supp. 1955).

5. *Hyzy v. Pittsburgh Coal Co.*, 384 Pa. 316, 121 A.2d 85 (1956); *Cappozoli v. Stone & Webster Eng. Co.*, 352 Pa. 183, 42 A.2d 524 (1945). See *Blair v. Langhead*, 108 Pa. Super. 407, 165 Atl. 58 (1933) (must plead rejection according to statutory provisions).

6. *Welsch v. Pittsburgh Terminal Coal Corp.*, 303 Pa. 405, 154 Atl. 716 (1931).

7. *E.g.*, *Walkofski v. Lehigh Valley R.R.*, 278 Pa. 84, 122 Atl. 238 (1923).

8. "It is not likely that the Legislature, in passing the Workmen's Compensation Act, intended to bar from compensation employees who violate safety laws and yet immunize employers from liability in trespass actions when they ignore the same safety laws. If violation of a safety law takes the claimant out of the course of employment, a disregarding of statutory requirements by the employer must remove him from the protection of the Workmen's Compensation Law." *Hyzy v. Pittsburgh Coal Co.*, 384 Pa. 316, 121 A.2d 85, 89 (1956) (dissenting opinion).

*Co.*<sup>9</sup> and *King v. Darlington Brick & Mine Co.*,<sup>10</sup> both involving the illegal employment of minors, have been cited as examples of an employer's illegal act which permitted the plaintiff to bring an action in trespass.<sup>11</sup> After these decisions, the legislature amended the Workmen's Compensation Act to include illegally employed minors.<sup>12</sup>

Eliminating the illegally employed minor as an exception to the exclusiveness of the Workmen's Compensation Act indicates the legislative intent to broaden the applicability of the act rather than to provide exceptions. Thus the instant case, standing for the pervasiveness of the act, is correctly decided. Those decisions which would tend to bring the justice of the instant case into question take a narrow view of the scope of employment. This view should be overcome, as the Legislature probably intended,<sup>13</sup> by affording the act the liberal construction it requires as remedial legislation.<sup>14</sup> To continue the doctrine of the cases which deny the remedy of workmen's compensation to employees who violate the law is not to cause a rent in the integrity of decision; on the contrary it is to preserve the program. The law should not aid a cause based on an illegal act.<sup>15</sup> Under the Workmen's Compensation Act, the employer-wrongdoer does not get the benefit of his wrong. The real benefit under the statute is conferred upon the claimant who receives an easy remedy. The law-makers have decided that the common good requires this benefit to be paid for by the surrender of the claimant's common-law right of action. This is a matter of legislative determination which the court has rightly enforced in this case.

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#### ZONING—NON-CONFORMING USE—REQUESTED CHANGE TO LESS UNDESIRABLE USE

*O'Neill v. Philadelphia Zoning Board of Adjustment* (Pa. 1956).

The purchaser of a property used as a commercial garage, a non-conforming use antedating the applicable zoning ordinance, applied to the Department of Licenses and Inspections for a permit to alter the building for use as a private garage and small ballet school. The permit was denied

9. 268 Pa. 504, 112 Atl. 73 (1920).

10. 284 Pa. 227, 131 Atl. 241 (1925).

11. *Hyzy v. Pittsburgh Coal Co.*, 382 Pa. 316, 121 A.2d 85 (1956) (dissenting opinion). *But see* *Welsch v. Pittsburgh Terminal Coal Corp.*, 303 Pa. 405, 154 Atl. 716 (1931).

12. PA. STAT. ANN. tit. 77, § 672 (Supp. 1955). See *Fritsch v. Pennsylvania Golf Club*, 355 Pa. 384, 50 A.2d 207 (1947).

13. The act is to cover "... all accidents occurring within this Commonwealth." PA. STAT. ANN. tit. 77, § 1 (Supp. 1955).

14. *Cf. Dun v. Trego*, 279 Pa. 518, 124 Atl. 174 (1924); *Pater v. Superior Steel Co.*, 263 Pa. 244, 106 Atl. 202 (1919).

15. *Walkofski v. Lehigh Valley R.R.*, 278 Pa. 84, 122 Atl. 238 (1923).

on the ground that the proposed use was not permitted in that district. She then appealed to the Zoning Board of Adjustment for a variance which, after a public hearing, was granted. A protesting neighbor appealed to the court of common pleas, which reversed the board holding that the applicant had not shown the "unnecessary hardship" prerequisite to such a grant. On appeal, the Supreme Court of Pennsylvania reversed and *held* that since appellant was required, in the absence of a variance, to convert the premises to a conforming use at an inordinate cost, the requisite hardship was shown, thus justifying reinstatement of the board's order granting the variance. *O'Neill v. Philadelphia Zoning Board of Adjustment*, 384 Pa. 379, 120 A.2d 901 (1956).<sup>1</sup>

A non-conforming use is one which antedates a zoning ordinance and is thus permitted to continue, although similar uses may not be inaugurated in the given area.<sup>2</sup> Many zoning ordinances expressly permit a change from one non-conforming use to another more desirable non-conforming use, without necessitating a variance, while prohibiting any change to a less desirable use.<sup>3</sup> The ordinance applicable to the instant case<sup>4</sup> adopts the latter provision but remains silent on the former. The court has construed the ordinance to require an application for a variance to make the change sought.<sup>5</sup> This is the more important and the most frequently used method<sup>6</sup> of circumventing the literal terms of an ordinance to avoid undue hardship upon an individual property owner. Its conditions are substantially the same everywhere.<sup>7</sup> The primary condition and the only one in question here is "unnecessary hardship." The courts have often held that mere financial hardship will not justify the granting of a variance.<sup>8</sup> But this holding is usually found in cases wherein the applicant hopes to secure a large profit,<sup>9</sup> whereas here the motive is to avoid a prohibitive loss.

1. *O'Neill v. Philadelphia Zoning Board of Adjustment*, 384 Pa. 379, 120 A.2d 901 (1956).

2. *Beyer v. Mayor and Council*, 182 Md. 444, 34 A.2d 765 (1943).

3. *Abbadessa v. Board of Zoning Appeals*, 134 Conn. 28, 54 A.2d 675 (1947); *Beyer v. Mayor and Council*, 182 Md. 444, 34 A.2d 765 (1943); *Buffalo v. Roadway Transit Co.*, 303 N.Y. 453, 104 N.E.2d 96 (1952).

4. PHILADELPHIA, CODE OF ORDINANCES, tit. 14, § 104 (1956).

5. *Darling v. Zoning Board of Adjustment*, 357 Pa. 428, 54 A.2d 829 (1947).

6. *Freeman v. Board of Adjustment*, 97 Mont. 342, 34 P.2d 534 (1934). The other device is an exception. "An exception in a zoning ordinance is one allowable where facts and conditions detailed in the ordinance as those upon which an exception may be permitted, are found to exist." *Deveraux Foundation Zoning Case*, 351 Pa. 478, 41 A.2d 744, *appeal dismissed*, 326 U.S. 686 (1945).

7. The applicant must show that the literal enforcement of the ordinance will result in unnecessary hardship to him, that granting the variance will not be contrary to the public interest, and that granting it will be to observe the spirit of the ordinance. See *Doolings Windy Hill, Inc. v. Zoning Board of Adjustment*, 371 Pa. 290, 89 A.2d 505 (1952); *Burkhardt v. Board of Zoning Appeals*, 191 Va. 606, 66 S.E.2d 565 (1951).

8. *Comley v. Boyle*, 115 Conn. 406, 162 Atl. 26 (1932); *Real Properties, Inc. v. Board of Appeals*, 319 Mass. 180, 65 N.E.2d 199 (1946).

9. *Easter v. Mayor and City Council*, 195 Md. 395, 73 A.2d 491 (1950); *Stolz v. Ellenstein*, 7 N.J. 291, 81 A.2d 476 (1951); *Pincus v. Power*, 376 Pa. 379, 101 A.2d 914 (1954).

The instant decision holds that financial hardship can satisfy the requirement of unnecessary hardship for the granting of a variance in cases wherein the applicant wishes to change a non-conforming use to a more desirable non-conforming use. But it does not specify how much of a financial expenditure is necessary to constitute unnecessary hardship. Hence, although the court has settled the instant case, it has not given clear guideposts for similar cases arising in the future. Mr. Justice Bell, concurring specially, asserts that a change such as the one made here is a matter of right and that no variance proceeding is necessary. This would appear to be the better interpretation of the ordinance in question, and the ground upon which the case should have been decided.<sup>10</sup>

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10. The adoption of the principle urged by Justice Bell would necessitate the overruling of the Darling case. *Darling v. Zoning Board of Adjustment*, 357 Pa. 428, 54 A.2d 829 (1947). It appears that the court, which was there concerned with a request to resume a non-conforming use, which had been abandoned, as a non-conforming use of a lower grade, misinterpreted the ordinance.